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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1859~~ 70-294

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

SHELL OIL COMPANY, a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX

	Page
Introduction	1
Factual Statement	3
The Questions Presented Are Without Merit	4
1. The City, Having Chosen to Measure Its Tax by Events in Part Taking Place Outside the City, Is Required by Due Process to Apportion Its Tax. No Decision of This Court Has Ever Recognized That a Local Government Has a Constitutional Right to Tax Beyond Its Boundaries	4
2. The Decision Below Is Correct and Does Not Permit a Taxpayer to Escape Paying Its Fair Share of Local Taxes	6
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases	Page
Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948)	4
General Motors Corp. v. City of Los Angeles, 5 Cal. 3d	5
General Motors Corp. v. Washington, 377 U.S. 346 (1964)	5
Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931)	4
National Bellas Hess, Inc. v. Department of Revenue of State of Illinois, 386 U.S. 753 (1967)	4, 5
Norfolk & Western Ry. v. Missouri State Tax Commission, 390 U.S. 317 (1968)	4
Norton Co. v. Department of Revenue of State of Illinois, 340 U.S. 534 (1951)	5
Southern Pacific Co. v. Gileo, 351 U.S. 493 (1965)	7
Washington ex rel. Gray's Harbor Logging Co. v. Coats-Fordney Logging Co., 243 U.S. 251 (1917)	7

Statutes	
United States Code, Title 28, Sec. 1254	6
United States Code, Title 28, Sec. 1257	6

IN THE

Supreme Court of the United States

October Term, 1970
No. 1839

THE CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

SHELL OIL COMPANY, a corporation,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Introduction.

Petitioner City of Los Angeles (City) imposes a business license tax on those engaging in business activities within its boundaries. The business activity in which Respondent Shell Oil Company (Shell) engages within the City is that of selling gasoline at wholesale. Although many of Shell's selling activities occur outside the City, the City has contended that it is entitled to measure the amount of its business license tax by 100% of the gross receipt of such sales if the gasoline was at any time within the City. Shell, on the other hand, has contended that due process requires the City to make a realistic apportionment between those gross receipts attributable to selling activities within the City and those attributable to selling activities outside the City and to measure its tax by only that portion of the receipts attributable to selling activities occurring within the City.

The California Supreme Court held that the Constitution of the State of California does require apportionment as contended by Shell and remanded this case to the Los Angeles Superior Court for further proceedings consistent with its opinion. (The opinion, which includes the relevant portions of the ordinances and administrative rulings involved, is appended to the Petition at A-1 to A-38.)

The California Supreme Court has spoken as the final authority on the construction of the California Constitution—the document to which the City owes its very existence—and has held that when the City choose[redacted]easure its tax by gross receipts arising from activities that take place in part within and in part without the City's boundaries the California Constitution requires the City to apportion "those gross receipts in a manner which fairly reflects the proportion of in-city to out-of-city activities." (A-34, ftn. 17.) Although the California Supreme Court's decision was presumably the last word on the City's powers pursuant to the California Constitution, the City petitions this Court claiming two questions are presented for determination. As Shell understands the City's claims, they are:

1. This Court has not only decided that state or local governments are permitted to tax events taking place outside their boundaries but that this Court has held such governments have a right to do so guaranteed by the United States Constitution and that the California Constitution cannot abridge such right.

2. The decision of the California Supreme Court permits Shell to escape paying its fair share of local taxes in violation of the City's right to due process of law.

Before considering these claims, we describe briefly the factual background of this lawsuit.

Factual Statement.

Shell refines gasoline at a refinery outside the City. The gasoline is delivered by clipper trucks to service stations throughout Southern California. The clipper trucks load gasoline either at the refinery outside the City or at a bulk plant in the City to which gasoline is transported by pipeline from the refinery. Transfer of title to the gasoline from Shell to the service station takes place at the point of delivery, the service station. The activities involved in selling the gasoline to the service stations are carried out at national headquarters in New York City, regional headquarters located in San Francisco, a divisional office in Los Angeles, and district offices located in Anaheim, Culver City, Long Beach, Pasadena, and San Bernardino, California. These selling activities include processing and accepting orders, arranging for delivery, and billing.

Deliveries to service stations in Southern California result in the following four taxable categories:

1. From the refinery outside Los Angeles to service stations in Los Angeles.
2. From the bulk plant in Los Angeles to service stations in Los Angeles.
3. From the refinery outside Los Angeles to service stations outside Los Angeles.
4. From the bulk plant in Los Angeles to service stations outside Los Angeles.

The only disputed category is the fourth category. Shell has conceded that all gross receipts of gasoline

sold to service stations within the City (categories 1 and 2) are to be reported for measurement of the business license tax. The City has conceded that gasoline sold from the refinery to the service stations outside the City (category 3) has so little connection with the City as to result in reporting only 15% of the gross receipts for measurement of the business license tax. However, the City has contended that the fact that the gasoline in the fourth category has been briefly within the City's limits entitles it to demand that 100% of the gross receipts on sales to service stations outside the City be included by Shell in the measurement of the City's business license tax. The City's contention was not accepted by the California Supreme Court.

The Questions Presented Are Without Merit.

1. The City, Having Chosen to Measure Its Tax by Events in Part Taking Place Outside the City, Is Required by Due Process to Apportion Its Tax. No Decision of This Court Has Ever Recognized That a Local Government Has a Constitutional Right to Tax Beyond Its Boundaries.

The decision of the California Supreme Court was correct and is entirely consistent with the holdings of this Court. *Norfolk & Western Ry. v. Missouri State Tax Commission,* 390 U.S. 317, 325 (1968), *National Bellas Hess, Inc. v. Department of Revenue of State of Illionois,* 386 U.S. 753 (1967), *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948), *Hans Rees' Sons, Inc. v. North Carolina,* 283 U.S. 123, 135-136 (1931). In the *Central Greyhound* case this Court, holding an unapportioned gross receipts tax in violation of the Commerce Clause, stated: "By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the costs

of the local government whose protection it enjoys.'" 334 U.S. at 663. And, according to the *Bellas Hess* decision, the requirement of apportionment for Commerce Clause reasons and the "test for a state's compliance with the requirements of due process in this area are similar." 386 U.S. at 756.

In brief, the holdings of this Court are that due process requires apportionment of a tax is to be measured by events or activities beyond the taxing government's boundaries. The City cites two cases for its novel proposition that due process is a sword permitting it to tax or measure its tax by events or activities outside its boundaries rather than a shield protecting the taxpayer from such exactions. The cited cases are *General Motors Corp. v. Washington,* 377 U.S. 346 (1964), and *Norton Co. v. Department of Revenue of State of Illinois,* 340 U.S. 534 (1951). Neither of them supports the City's contention. In *Norton* Illinois was allowed to impose a tax on goods sold in Illinois by the taxpayer. Likewise in *General Motors* Washington was permitted to measure its tax by sales that had taken place within Washington. In neither *Norton* nor *General Motors* was the state attempting to tax sales, or to measure its tax by sales, which had taken place beyond its boundaries. As the California Supreme Court stated in a decision filed June 28, 1971, involving the very same City tax, *General Motors Corp. v. City of Los Angeles,* 5 Cal. 3d ...., at footnote 13:

> "In spite of our *Shell* decision [the decision the City here seeks to review] the City continues to rely upon *General Motors v. Washington* (1964) 377 U.S. 436 for the proposition that an unapportioned tax is proper in these circumstances. It

suffices to say that *Shell*, which was based primarily upon our interpretation of provisions of the state Constitution, is controlling in this state to the extent that its requirements of apportionment are more stringent than those approved in *General Motors v. Washington*."

2. The Decision Below Is Correct and Does Not Permit a Taxpayer to Escape Paying Its Fair Share of Local Taxes.

The City's statement (Petition, p. 14) that the decision of the California Supreme Court "divests the City of Los Angeles of its right to tax without due process of law" is an unintentionally correct statement of what the City was attempting to do until halted by the California Supreme Court. The City then goes on to suggest (Petition, p. 15) that Shell is now going to be able to "escape paying its fair share of local taxes . . ." Such a contention is contrary to the decision of the California Supreme Court which held that the City can impose taxes "as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction . . ." (A-28.)

The California Supreme Court has held that Shell is entitled to apportionment and remanded the case to the Los Angeles Superior Court for proceedings consistent with that decision. The City's contention that Shell will escape its fair share of the tax burden is without support in the decision it seeks to have reviewed. Furthermore, the City's Petition is not based upon a final judgment as required by 28 U.S.C. §1257. (The City erroneously states in its Petition that this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.) Because the issues of how apportionment is to be made

and what, it any, tax refund Shell is to receive have yet to be determined in the trial court and, perhaps, reviewed in California appellate courts, Shell submits that this case is not ripe for review and that there is no final judgment to bring before this Court. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1956), *Washington ex rel. Gray's Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917).

Conclusion.

The City's Petition should be denied because the California Supreme Court has decided the City's taxing powers are limited as a matter of California constitutional law, its decision is entirely consistent with, not adverse to, the decisions of this Court, its decision does not permit Shell to escape its fair share of taxes, and is not, in that respect, final.

Respectfully submitted,

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